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No. 97-156

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Randon Bragdon, D.M.D., replies to respondent Sidney Abbott's brief in opposition as follows:

First, Ms. Abbott acknowledges the direct conflict between courts of appeals, and among many lower federal courts, on whether reproduction is a major life activity under the ADA, and provides no rationale as to *why*, in this instance, it makes sense for the Court to insist on further development of the law before considering the issue.

Second, Ms. Abbott has never identified a major life activity in which she was allegedly "regarded as" substantially limited. Therefore, contrary to her argument, she has no viable claim under *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), that she was "regarded as substantially limited in a major life activity."

Third, *Arline* holds that Gene Arline was disabled *in spite of the fact* she was contagious, *not because* she was contagious. The Court further explained that Ms. Arline was actually disabled under the statute because of her record of being substantially limited in a major life activity. *Id.* at 280-281. Thus, contrary to Ms. Abbott's argument, *Arline* is not strong support for a theory she is disabled because Dr. Bragdon regarded her as infectious.

Fourth, Dr. Bragdon pressed below the third and fourth questions presented in his petition. *See* Appellant's Brief in First Circuit, pp. 29-32. Ms. Abbott presented arguments that Dr. Bragdon waived these issues, in part by not relying for summary judgment purposes on his testimony as an expert on certain issues. *See* Appellee's Brief, p. 4. Dr. Bragdon replied to these waiver arguments. *See* Appellant's Reply Brief, pp. 12 n.11, 21-23. The Appeals Court rejected the waiver arguments, and passed on questions three and four. *See* pp. 17a-22a of the petition appendix. Contrary, therefore, to Ms.

Abbott's argument in footnote eleven of her opposition to the petition, questions three and four of the petition are properly raised on this record. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule, as the dissent correctly notes, precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" (citation omitted)).

Fifth, Ms. Abbott misrepresents that this is a refusal to treat case, and misrepresents the circumstances and facts concerning Dr. Bragdon's willingness and ability to perform invasive procedures on Ms. Abbott in local hospitals and/or hospital-like settings.

Sixth, Ms. Abbott omits relevant evidence in the record concerning how it is safer to treat HIV-infected individuals in a hospital-like setting.

WHEREFORE, Dr. Bragdon requests that the Court agree to review the questions presented in this case.

Respectfully submitted,

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